care to avoid the pedestrian. The difference lies in the proof of negligence. A different situation is presented when a right-of-way ordinance is involved. Violation of such an ordinance by the motorist may constitute negligence *per se*.[7] But such an ordinance must be unequivocal in its terms in order to confer an absolute right on the pedestrian. In *Horwitz* v. *Eurove*[8] the Ohio Supreme Court held that an ordinance which provided: "The right of way upon street crossings . . . shall, in all cases, be given to pedestrians by all vehicles of every kind," created only a preferential, not an absolute, right. In this it was consistent with decisions in other jurisdictions.[9]

The question in these cases usually involves, not the defendant's negligence, but the contributory negligence of the plaintiff. Under either view, the pedestrian must use due care to avoid injury in crossing. If his right is only relative he must keep a lookout for automobiles, but he has a right to assume that motorists will obey the light signals.[10] If his right to cross is absolute his duty to look out may be lessened. Some cases dealing with a pedestrian's right of way have said that he need not keep a continuous lookout.[11] Where a statute exists, the pedestrian has a right to assume that the motorist will obey it.[12]

While a doctrine giving the pedestrian an absolute right would have the merit of certainty and be more easily applied, it would seem that the rule of the principal case is more nearly in accord with the usual practice at street crossings and gives to the plaintiff all that he should reasonably expect. R. C. H.

Torts — Proximate Cause and Per Se Negligence

A city ordinance of Warren, Ohio, provided that vehicular traffic was entitled to the right of way between intersections, but that such provision should not operate to relieve drivers of due care for the safety of pedestrians.[1] The plaintiff was struck and injured by the defendant's automobile, as he attempted to make a crossing between intersections. Testimony indicated that the automobile was moving at an excessive

[7] *Schell* v. *DuBoise, adm'r*, 94 Ohio St. 93, 113 N.E. 664, 1917A A.L.R. 710 (1916).
[8] *Horwitz* v. *Eurove*, 129 Ohio St. 8, 193 N.E. 644, 96 A.L.R. 782 (1934).
[9] *Rolfs* v. *Mullins*, 179 Iowa 1223, 162 N.W. 783 (1917); *Bora* v. *Yellow Cab Co.*, 103 N. J. Law 377, 135 Atl. 889 (1927).
[10] *Cleveland Ry.* v. *Goldman, supra*, note 6.
[11] *Newman* v. *Protective Motor Service*, 298 Pa. 509, 148 Atl. 711 (1930); *Griffith* v. *Slaybaugh*, 29 F. (2d) 437 (1928).
[12] *Hart* v. *Devereux*, 41 Ohio St. (1885); *Norris* v. *Jones*, 110 Ohio St. 598, 144 N.E. 274 (1924).

[1] The Warren ordinance, enacted in 1929: "Every pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk shall yield the right of way to vehicles on the roadway, provided that *this provision shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of pedestrians.*" (Italics added)

rate of speed, that the plaintiff had looked in both directions before starting to cross, but that he (the plaintiff) had not, after seeing the approaching car some 255 feet away, again looked in that direction. The defendant moved for a directed verdict on the ground that the plaintiff was negligent as a matter of law. The motion was overruled, as was a subsequent motion for judgment notwithstanding the verdict, and judgment was entered upon a verdict in favor of the plaintiff. This judgment was reversed by the Court of Appeals for Trumbull County, the court ruling that the violation of a safety ordinance was negligence *per se* which barred recovery as a matter of law. In view of a conflicting decision by another appellate court,[2] the cause was certified to the Supreme Court. A majority of the highest court upheld the ruling of the trial judge, saying that, although the plaintiff was negligent *per se* the problem of proximate cause was one of fact which was properly for the jury.[3]

It seems well established in Ohio that the violation of a statute or ordinance passed for the protection of the public is negligence *per se*.[4] The rule has been applied many times in cases involving "right of way" ordinances similar to the one construed in *Smith* v. *Zone Cabs*.[5] In view of these apparently consistent holdings, the court in the principal case declared the pedestrian negligent as a matter of law. It remained to inquire whether such negligence was a proximate cause of his injuries.[6] Where reasonable minds might differ, this is a question of fact for the jury.[7] A pedestrian does not forfeit his right to prove that his injuries were caused proximately by the negligence of another, and not by his own failure to meet a standard of due care, merely through his violation of a safety ordinance designed to protect human life.[8]

Do the facts of the instant case (and others of like character) present a problem of causal relation upon which reasonable minds might differ? A city ordinance grants a right of way to vehicular traffic between intersections. A pedestrian violates this right of way by walking into the street. He is struck by an automobile, and suffers injury. By

[2] *Mansperger* v. *Ehrnfield*, 59 Ohio App. 74, 17 N.E. (2d) 271 (1937).

[3] *Smith* v. *Zone Cabs*, 135 Ohio St. 415, 21 N.E. (2d) 336, 14 Ohio Op. 316 (1939).

[4] *Schell* v. *Du Bois Admr.*, 94 Ohio St. 93, 113 N.E. 664, L.R.A. 1917 A, 710 (1916); *Taugher et al.* v. *Ling*, 127 Ohio St. 142, 187 N.E. 19 (1933); *Portage Markets Co.* v. *George*, 111 Ohio St. 775, 146 N.E. 283 (1924).

[5] *Smith* v. *Zone Cabs, supra*, note 3; *Standard Motor Sales Co.* v. *Miller*, 30 Ohio App. 7, 164 N.E. 55 (1928); *Horwitz* v. *Eurove*, 129 Ohio St. 8, 193 N.E. 644 (1934).

[6] In *Martin* v. *Herzog*, 228 N. Y. 164, 126 N.E. 814 (1920), where a car traveling on the wrong side of the highway struck a buggy without lights, Cardozo, J., said: "We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury."

[7] *Sharp* v. *Russell*, 37 Ohio App. 306, 174 N.E. 617 (1930); *Restatement of the Law, Torts*, sec. 476.

[8] *Schell* v. *Du Bois, Adm'r., supra*, note 4.

and large, although exceptional circumstances may be imagined, this set of facts (the principal case) was contemplated by the authors of the ordinance. Effective causal connection between violation and injury seems inescapable. Proximate cause, if the term has any real meaning, is too evident to be denied. If the question of proximate causation, under circumstances such as these, is one of fact for the jury, the term becomes one of convenience rather than real utility. Reasonable minds could not differ upon any but unique circumstances.[9]

If it be assumed that the final word has been spoken concerning *per se* negligence in cases of this character, the action of the court in refusing to say that this plaintiff's negligence was the proximate cause of his injuries as a matter of law may be defended on the ground that it gives effect—by invoking the issue of proximate cause—to the manifest purpose of the statute. If, as a matter of law, an injured pedestrian is denied recovery from a negligent driver because of his (the pedestrian's) *per se* negligence in the violation of a safety ordinance, the purpose of the enactment is thwarted, and it imperils human life while purporting to protect it. The pedestrian, prior to enactment, might at least show that his own conduct did not constitute negligence. If negligence and causation are both conclusively proved by the mere showing that he did, in fact, violate an ordinance intended to protect him by defining and limiting his right to cross streets, the enactment for his benefit has operated to his detriment. It has placed the offending pedestrian at the mercy of the negligent driver.

The *per se negligence* doctrine has been applied without fundamental refinement to violations of various statutes in Ohio. In *Sharp* v. *Russell*,[10] the violation of G.C. secs. 6310-22 and 6310-27, respecting signals when stopping and place of stopping on the highway, was held to be negligence *per se*. The same principle has been applied to G.C. sec. 12603 which provides that a driver must be able to stop within the assured clear distance ahead.[11] The violation of specific speed statutes was termed *per se* negligence in *Schell* v. *Du Bois*.[12] However, enough variation may be found in the decisions of Ohio, and other courts, to make speculation as to further exceptions to the rule of *per se* negligence

[9] GREENE, RATIONALE OF PROXIMATE CAUSE, p. 132: "Causal relation is one of fact. It is always for the jury, except when the facts are such that they will support only one reasonable inference. The courts as a matter of theory all agree so far. The exception obtains in the great majority of cases, as the facts are so clear that no issue is raised as to causal relation."

[10] *Sharp* v. *Russell*, *supra*, note 7.

[11] *Skinner* v. *Penna. Rd. Co.*, 127 Ohio St. 69, 186 N.E. 722, 13 Ohio L. Abs. 59 (1933).

[12] *Schell* v. *Du Bois Admr.*, *supra*, note 4; *Allen* v. *Smith*, 5 Ohio App. 284, 27 Ohio C.C. (N.S.) 203 (1916).

useful. It has been held that driving in excess of the limits set up in the Ohio speed statute, G.C. sec. 12603, is not negligence *per se*.[13] This construction was necessary to preserve the expressed intent of the statute, that driving in excess of the specific limit was only *prima facie* unlawful. This indicates that the Ohio courts will deviate from the established rule under the pressure of a precisely worded statute. In *Witherspoon* v. *Irons*,[14] crossing a street within ten feet of a crosswalk—in violation of an ordinance—was held not to be negligence as a matter of law. Further exception was taken in *Misrach* v. *Epperson*,[15] and in *Fightmaster* v. *Mode*,[16] where the courts in distinguishing the cases used language commonly employed in discussing simple negligence problems, when negligence is a matter of fact to be proved and violation of a statute is only part of the proof. In *Horwitz* v. *Eurove*,[17] the court, in dealing with a right of way ordinance, described it as creating a preferential rather than an absolute right—a view which is hardly compatible with the concept of *per se* negligence. The Ohio case farthest removed from the general idea that violation of an ordinance for public protection is negligence *per se*, is *Mansperger* v. *Ehrnfield*.[18] Here, the effect of an ordinance similar to the one under consideration in the principal case was analyzed, and it was held that such an ordinance does not relieve a driver of the duty to exercise due care, that the contributory negligence of the violator is not a matter of law, but a question for jury determination.

A careful perusal of the entire majority opinion in *Smith* v. *Zone Cabs*,[19] reveals that the court may not be adhering as closely to the *per se* negligence rule as the first sentences of the opinion indicate. After enunciating the rule, granting negligence, and reserving proximate cause for the jury, it launches into a discussion calculated to disprove the negligence of the pedestrian, citing cases upon the problems of continuous observation, judgment of the driver's speed, *etc.* Although this does not disturb the manifest position of the court, it does reflect doubt as to the tenability of the view which holds pedestrians who violate ordinances of this character to be negligent *per se*.

Courts in other jurisdictions have held diversely on the point. Some have assumed the position generally adopted by the Ohio courts, that

[13] *Swoboda* v. *Brown*, 129 Ohio St. 512, 196 N.E. 274 (1935); *Lazzara* v. *Hart*, 45 Ohio App. 368, 187 N.E. 190, 14 Ohio L. Abs. 563 (1933).

[14] *Witherspoon* v. *Irons*, 18 Ohio L. Abs. 193 (1934).

[15] *Misrach* v. *Epperson*, 32 Ohio App. 451, 168 N.E. 230 (1929).

[16] *Fightmaster* v. *Mode*, 31 Ohio App. 273, 167 N.E. 407, 30 Ohio L. Rep. 281 (1928).

[17] *Horowitz* v. *Eurove*, *supra*, note 5.

[18] *Mansperger* v. *Ehrnfield*, *supra*, note 2.

[19] *Smith* v. *Zone Cabs*, *supra*, note 3.

violation of a right of way ordinance is negligence *per se*.[20] Other jurisdictions say that such ordinances impose upon the pedestrian a duty to exercise greater care, or give rise to an obligation of continuous observation, but these courts insist that the driver is not relieved of his duty to exercise due care for the safety of the offending pedestrian.[21] To hold otherwise is to negative a clear intent that the ordinance "shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of pedestrians," and to leave the pedestrian who has inadvertently invaded the vehicular right of way, without remedy against the driver who negligently injures him, unless proximate cause be submitted to the jury and resolved in his favor. R. M. A.

UNINCORPORATED ASSOCIATIONS

Unincorporated Associations — Suability of Labor Unions

In an action against an international unincorporated association of railroad engineers by one of its members for damages resulting from a claimed dereliction of duty of certain officers of the union, the court in a *dictum* said that the association is suable if a proper foundation is laid, basing its statement on the cases following *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, 42 S. Ct. 570, 66 L. Ed. 975, 27 A.L.R. 762 (1922) and on Ohio G.C. sec. 11257. *McClees* v. *Grand International Brotherhood of Locomotive Engineers*, 59 Ohio App. 477, 12 Ohio Op. 111, 18 N.E. (2d) 812 (1938).

The decision turned on another point, but the court's statement raises the important question of the suability of voluntary associations in general and unincorporated labor unions in particular. It is well settled at common law that a voluntary association is not a legal entity distinct from that of its members. Thus, at common law, an unincorporated labor union could not sue or be sued in its association name, but every member of the labor union had to be made a party to the action.[1]

[20] *Koeppel* v. *Daluiso*, 118 Cal. App. 442, 5 P. (2d) 457 (1931).

[21] *Ivy* v. *Marx*, 205 Ala. 60, 87 So. 813, 14 A.L.R. 1173 (1920): "the ordinance was certainly passed with a view to protect human life, and to give the ordinance a construction which would sanction a relaxation of vigilance on the part of drivers of automobiles upon the public streets would run counter to its evident intent." *Rhimer* v. *Davis*, 126 Wash. 470, 218 Pac. 193 (1920); *W. B. Bassett & Co.* v. *Ward*, 146 Va. 654, 132 S.E. 700 (1926); *Webb-Pepploe* v. *Cooper*, 159 Md. 426, 151 Atl. 235 (1930); *Saunders* v. *Yellow Cab Co.*, 182 Minn. 62, 233 N.W. 599 (1930).

[1] *Cahill* v. *Plumbers, Gas and Steam Fitters' and Helpers' Local 93*, 238 Ill. App. 123 (1925); *Varnado* v. *Whitney*, 166 Miss. 663, 147 So. 479 (1933); Warren, Corporate Advantages Without Incorporation, (1929) pp. 667-8; Note (1938) 26 Georgetown L. J. 999, 1000-2; Note (1937) 21 Minn. L. Rev. 203; 27 A.L.R. 786 (1922); 1 Brit. Rul. Case 852.